Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1995

ALMIR P. DeSOUZA

Petitioner,

-against

STATE OF NEW JERSEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Mr. Almir P. DeSouza
No. 251556
New Jersey State Prison
Second and Cass Streets
CN 861
Trenton, New Jersey 08625
(Appearing pro se)

QUESTIONS PRESENTED FOR REVIEW

Whether the trial court's jury instructions phrasing the four factors of passion-provocation manslaughter in the negative and indicating that the state of New Jersey must disprove only one such factor unconstitutionally minimized the prosecution's burden of proving the elements of murder?

Whether the trial court's jury instruction that "words alone do not constitute adequate provocation" in a case where words provide the provocation justifying a manslaughter conviction unconstitutionally removed the central issue of guilt from the consideration of the jury?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED . . . 2

STATEMENT OF THE CASE 2

Proceedings Below 2

Statement of Facts 3

The Jury Instruction on Murder and Manslaughter 9

ARGUMENT

TABLE OF CONTENTS, CONTINUED

POINT ONE

BY PHRASING THE FOUR FACTORS OF PASSION-PROVOCATION MANSLAUGHTER IN THE NEGATIVE, AND BY STATING THAT THE STATE MUST DISPROVE ONLY ONE SUCH FACTOR, THE TRIAL COURT'S JURY INSTRUCTIONS UNCONSTITUTIONALLY MINIMIZED THE PROSECUTION'S BURDEN OF PROVING THE ELEMENTS OF MURDER 13

POINT TWO

THE TRIAL COURT'S INSTRUCTION THAT "WORDS ALONE DO NOT CONSTITUTE ADEQUATE PROVOCATION" IN A CASE WHERE WORDS PROVIDE THE PROVOCATION JUSTIFYING A MANSLAUGHTER CONVICTION UNCONSTITUTIONALLY REMOVED THE CENTRAL ISSUE OF GUILT FROM THE CONSIDERATION OF THE JURY 22

CONCLUSION 28

APPENDIX A1

TABLE OF AUTHORITIES

United States Supreme Court Cases — Page

Cage v. Louisiana, 498 U.S. 39 (1990). 17,27

Carella v. California, 491 U.S. 263 (1989) 17,27

Cupp v. Naughten, 414 U.S. 141 (1973) 21

Estelle v. McGuire, __U.S.__,
112 S.Ct. 475 (1991) 14

Francis v. Franklin, 471 U.S. 307 (1984) 27

In Re Winship, 397 U.S. 358 (1970) 3,17-20,27

Mullaney v. Wilbur, 421 U.S. 684 (1975) 3,18-21

Patterson v. New York, 432 U.S. 197 (1977) . . . 20,21

Sandsrom v. Montana, 442 U.S. 510 (1979) 17,27

TABLE OF AUTHORITIES, CONTINUED

Sullivan v. Louisiana, __U.S.__,
113 S.Ct. 2078 (1993) 17,25

United States v. Gaudin, __U.S.__,
115 S.Ct. 2310 (1995) 24-26

Victor v. Nebraska, __U.S.__,
114 S.Ct. 1239 (1994) 14

New Jersey Cases

State v. Grunow, 102 N.J. 133 (1986) 17

State v. Powell, 84 N.J. 305 (1980) 17

Statutes

U.S. Constitution, amendment V . . . . . passim

U.S. Constitution, amendment VI . . . . . passim

U.S. Constitution, amendment XIV . . . . . passim

28 U.S.C. Section 1257 (a) 1

N.J.S.A. 2C:11-3 2

N.Y.P.L. 125.25(1)(a) 21

OPINIONS BELOW

Petitioner was convicted, after trial by jury, of murder and weapons possession charges in the Superior Court of New Jersey, Monmouth County. The Superior Court of New Jersey, Appellate Division, affirmed the murder conviction in a written, unpublished opinion (a copy of which is attached as Appendix A). The New Jersey Supreme Court denied a Petition for Certiorari (a copy of which is attached as Appendix A at A9) and filed such order on October 24, 1995.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1257(a). The final disposition of this case below was the denial of a Petition for Certiorari by the Supreme Court of the State of New Jersey, allowing to stand the Appellate Division's affirmance of petitioner's murder conviction. The New Jersey Supreme Court's denial was filed on October 24, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States

Constitution states in pertinent part:

No person shall...be deprived of life, liberty, or property, without due process of law...(.)

The sixth amendment to the United States

Constitution states in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...(.)

The fourteenth amendment to the United States

Constitution states in pertinent part:

(N) or shall any state deprive any person of life, liberty, or property, without due process of law...(.)

STATEMENT OF THE CASE

Proceedings Below

Petitioner was convicted, after jury trial, of murder, in violation of N.J.S.A. 2C:11-3, and weapons possession

offenses. The Appellate Division affirmed the murder conviction, and the New Jersey Supreme Court thereafter denied a Petition for Certiorari.

In both the Appellate Division and the state Supreme Court, Petitioner asserted that the trial court's jury instructions violated state and federal law. Petitioner's briefs specifically referred both New Jersey courts to this Court's decisions in Mullaney v. Wilbur, 421 U.S. 684 (1975) and In Re Winship, 397 U.S. 358 (1970). By affirming his murder conviction and denying certification, the Appellate Division and state Supreme Court respectively have impliedly held that the jury instructions did not violate petitioner's rights under the United States Constitution.

Statement of Facts

Petitioner was convicted of murder for the stabbing death of his live-in, girlfriend, Michelle Hansen on January

11, 1992. The State of New Jersey's evidence at trial indicated Ms. Hansen and petitioner had become romantically involved late in 1990, and had been living together in Ms. Hansen's apartment. Toward the end of 1991, Ms. Hansen decided to end her relationship with petitioner due, in part, to petitioner's jealousy toward her.

Ms. Hansen allowed petitioner to sleep on her couch during the first week and a half of January 1992 until he could find a place to live. On the night of January tenth into the morning of the eleventh, Ms. Hansen, a licensed nurse, was working at the Garden State Rehabilitative Hospital. Petitioner phoned Ms. Hansen at the hospital and stated he had a place to stay but that he loved her and wanted a chance to rebuild the relationship. Ms. Hansen replied that the relationship was over. Petitioner phoned two more times

during the early morning hours, but Ms. Hansen directed the hospital's operator to inform petitioner that she was not there.

Ultimately, petitioner got through to Ms. Hansen and apparently told her that, while looking through her things, he found a card sent to her by an individual named Deepak Patel. The card addressed Ms. Hansen as "dearest one" and was signed "I love you, Yours forever." On the card, Mr. Patel wrote to Ms. Hansen that he "missed your kisses." The prosecution provided evidence that Mr. Patel was a former patient who was quadriplegic and confined to a wheelchair. The record fails to indicate whether petitioner was aware of Mr. Patel's condition or his relationship to Ms. Hansen. After this telephone conversation, Ms. Hansen refused to accept petitioner's phone calls.

Mr. Patel's card to Ms. Hansen, found by petitioner, contained Mr. Patel's phone number. Phone records indicate that between 4:48 a.m. and 5:20 a.m. on January 11th, two calls were placed, presumably by petitioner, from the phone in Ms. Hansen's apartment to Mr. Patel.

When petitioner failed to pick up Ms. Hansen after her shift, Ms. Hansen received a ride to her apartment from a colleague. During this ride, Ms. Hansen indicated she was going to kick petitioner out of the apartment, expel his belongings and give him the "ba jesus" (sic).

Upon arriving home, according to neighbors, Ms. Hansen yelled very loudly at petitioner. However, after a short period of silence, Ms. Hansen was heard screaming with terror and hysteria. A neighbor heard her ask for an ambulance, and phoned the police.

Police arrived to find Ms. Hansen on the floor with her head on a pillow and a brown towel over her stomach. Her clothes and the rug were covered with blood coming from two puncture wounds to her stomach. She was still alive, and repeatedly stated she could not breathe. When asked what happened, petitioner shrugged his shoulders and did not respond. Ms. Hansen was asked "who stabbed you" and she pointed at petitioner and said, "he did."

Petitioner was questioned shortly thereafter. He expressed concern about what he called "the love card" and referred to the stabbing as an accident. Later, while searching the apartment, police found the card. It was torn in half and had blood on it. Police also recovered from petitioner's wallet a phone bill of Ms. Hansen's with a December 9, 1991 call underlined. The number called was that of Mr. Patel.

Petitioner gave a statement to police in which he indicated that he found the "love card" while looking for clothes. When he phoned the hospital and sought an explanation, Ms. Hansen hung up on him. Petitioner said he fell asleep and failed to pick up Ms. Hansen at the hospital. When she returned home, she sarcastically thanked him for picking her up. He confronted her about the card and they exchanged "bad words." Petitioner stated that Ms. Hansen retrieved a knife from the kitchen, and in an attempt to disarm her, they both fell to the floor. Seeing the blood, he put a pillow under her head, returned the knife to the kitchen and phoned for an ambulance.

Further along in his statement, petitioner stated that upon finding the card, he was "upset, jealous, betrayed. I saw the world falling. I didn't expect that Michelle could do something like that to me."

Petitioner was convicted of murder and weapons offenses. He was sentenced to serve a term of incarceration of sixty years with a mandatory minimum term of thirty years.

The Jury Instruction on Murder and Manslaughter

Based on the evidence, the trial court instructed the jury on the crime of murder and the lesser included crimes of aggravated manslaughter, reckless manslaughter and passion-provocation manslaughter. The charge on the relationship between murder and passion-provocation manslaughter was as follows:

> (T)he defendant is chargĕd with murder of Michelle Hansen. Count one of the indictment...charges...that the defendant...committed the crime of murder in that he purposely or knowingly caused the death of Michelle Hansen or purposely or knowingly caused the serious bodily injury to Michelle Hansen resulting in her death.

I charge you that a person is guilty of murder if he, one, purposely causes death or serious bodily injury resulting in death or, two, knowingly causes death or serious bodily injury resulting in death and did not act in the heat of passion resulting from a reasonable provocation.

I'm going to define all those for you. If you find beyond a reasonable doubt that the defendant purposely or knowingly caused Michelle Hansen's death or serious bodily injury resulting in her death and that he did not act in the heat of passion resulting from a reasonable provocation, the defendant would be guilty of murder.

If, however, you find that the defendant purposely or knowingly caused the death or serious bodily injury resulting in her death and that he did act in the heat of passion resulting from a reasonable provocation, the defendant would be guilty of passion/provocation manslaughter, which is lesser offense.

In order for you to find the defendant guilty of murder, the State is required to prove each of the following elements beyond a reasonable doubt: first, that the defendant caused Michelle Hansen's death or serious bodily injury resulting in her death and, two, that the defendant did so purposely or knowingly. And three, that the defendant did not act in the heat of passion resulting from a reasonable provocation.

The third element that the State must prove beyond a reasonable doubt to find the defendant guilty of murder is that the defendant did not act in the heat of passion resulting from a reasonable provocation. Passion/provocation manslaughter is a death caused purposely and knowingly that is committed in the heat of passion resulting from a reasonable provocation. Passion/provocation manslaughter has four factors which distinguish it from murder.

In order for you to find the defendant guilty of murder, the State need only disprove one of these four factors beyond a reasonable doubt. The four factors are, one, there was adequate provocation. Two, the provocation actually impassioned the defendant. Three, the defendant did not have a reasonable time to cool off between the provocation and the act which caused the death. Four, the defendant did not actually cool off before committing the act which caused the death.

First, you must decide whether the provocation was adequate...Whether provocation is adequate essentially amounts to whether loss of self-control is a reasonable reaction to the circumstances. The provocation must be sufficient to arouse the passion of an ordinary person beyond the power of his control.

Example, words alone do not constitute adequate provocation. On the other hand, a threat with a gun or a knife or a significant physical confrontation might be considered adequate provocation.

Second, you must determine whether the defendant actually was impassioned, that is whether he actually lost self-control. Third, you must determine whether the defendant had a reasonable time to cool off. In other words, you must determine whether the time between the particular provoking incident and the act which caused the death was inadequate for the return of a reasonable person's self-control.

Fourth, you must determine whether the defendant actually did not cool off before committing the act which caused the death. That is whether he was still impassioned.

If you determine that the State has disproved beyond a reasonable doubt that there was adequate provocation or that the provocation actually impassioned the defendant or that the defendant did not have a reasonable time to cool off or that the defendant did not actually cool off and in addition to disproving one of those four factors you determine that the state has proven beyond a reasonable doubt that the defendant purposely or knowingly caused the death or serious bodily injury resulting in death, you must find the defendant guilty of murder.

> On the other hand, if you determine that the state has not disproven at least one of the factors of passion/provocation manslaughter beyond a reasonable doubt but that the State has proven beyond a reasonable doubt that defendant purposely or knowingly caused the death or serious bodily injury resulting in death, then you must find him guilty of passion/provocation manslaughter.

After receiving the above charge on Murder and Passion-Provocation Manslaughter, the jury convicted petitioner of Murder.

ARGUMENT

POINT ONE

BY PHRASING THE FOUR FACTORS OF PASSION-PROVOCATION MANSLAUGHTER IN THE NEGATIVE, AND BY STATING THAT THE STATE MUST DISPROVE ONLY ONE SUCH FACTOR, THE TRIAL COURT'S JURY INSTRUCTIONS UNCONSTITUTIONALLY MINIMIZED THE PROSECUTIONS BURDEN OF PROVING THE ELEMENTS OF MURDER

The trial court's jury instructions unconstitutionally minimized the prosecution's burden to prove the elements of

murder beyond a reasonable doubt. First, the court's phraseology of the four factors of passion-provocation manslaughter is reasonably likely to confuse the jury as to whether the prosecution or accused sustains the burden of proof. See Victor v. Nebraska, __U.S. __,.114 S.Ct. 1239 (1994); Estelle v. McGuire, __U.S. __, 112 S.Ct. 475 (1991)(Constitutional inquiry is not whether a jury instruction "could have" been unconstitutionally applied, but whether there is a "reasonable likelihood" that it was so applied). Second, the instruction that "the State need only disprove one of these four factors beyond a reasonable doubt," implies that the accused bears an initial burden of proving one or more of these factors such that the state must then attempt to disprove one or more.

On the issue of the court's phrasing of the passion-provocation manslaughter factors, the trial judge instructed

the jury, "you must determine whether the time between the particular provoking incident and the act which caused death was inadequate for the return of a reasonable person's self control." A proper charge, and one which places the burden to prove these facts on the state, would be to instruct the jury simply that the State had to prove the amount of time was adequate. The trial court also charged, "you must determine whether the defendant actually did not cool off before committing the act which caused the death." A proper charge on this point would be that the state must prove that the accused actually cooled off before committing the lethal acts. As read to the jury, the charge on the passion-provocation manslaughter factors did not clearly place the burden of proof on the State of New Jersey. As the Appellate Division observed below, "(p)utting in the negative what the State had to disprove may have caused

some confusion regarding the issue of burden of proof." See Appendix, A- .

Furthermore, the jury charge that "the State need only disprove one of these four factors beyond a reasonable doubt," implicitly suggests that the accused has an initial burden to prove heat of passion. The state will then bear the burden to disprove one or more of the four heat of passion elements. This implication is all the more likely considering the jury was not instructed at any point during the charge on murder and passion-provocation manslaughter that the accused need not prove anything.

Despite the Appellate Division's concession that the jury charge on murder and the burden of proof was confusing, the charge was upheld, in part, because it was essentially based on the model charge. However, this Court has struck down model jury instructions when such violate

constitutional rights. See Sullivan v. Louisiana, __U.S. __, 113 S.Ct. 2078 (1993); Cage v. Louisiana, 498 U.S. 39 (1990); Carella v. California, 491 U.S. 263 (1989); Sandstrom v. Montana, 442 U.S. 510 (1979).

The jury instructions indicated that an element of Murder under New Jersey law is that the accused "did not act in the heat of passion resulting from a reasonable provocation." State v. Grunow, 102 N.J. 133 (1986); State v. Powell, 84 N.J. 305 (1980). Because the New Jersey statutory scheme makes the absence of heat of passion an element of murder, the prosecution is constitutionally bound to bear the burden of proving this element beyond a reasonable doubt. See In Re Winship, 397 U.S. 358 (1970) In Winship, this Court adamantly stated, "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of

every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. at 364.

Since the absence of heat of passion is a fact necessary to constitute the crime of murder, the holding in Winship requires the State of New Jersey to prove such absence beyond a reasonable doubt. A necessary corollary of the Winship holding is that the fourteenth amendment due process rights of an accused will be violated where he or she, rather than the prosecution, is forced to bear the burden, or is reasonably perceived by the jury to bear the burden, to prove any elements of a criminal offense.

This Court addressed this issue in Mullaney v. Wilbur, 421 U.S. 684 (1975). The Mullaney Court, applying the holding in Winship, found unconstitutional the State of Maine murder statute, which required the accused to prove by a preponderance of the evidence that he or she acted in the

heat of passion in order to reduce a charge of murder to manslaughter. In Mullaney, the jury was charged, "malice aforethought is an essential and indispensable element of the crime of murder" and that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." Mullaney, 421 U.S. at 686. The court went on to charge, "malice aforethought and heat of passion on sudden provocation are two inconsistent things." Mullaney, 421 U.S. at 686, 687.

Because the accused in Mullaney was obligated to prove heat of passion, a fact which, if proven, would directly negate the element of malice aforethought, this Court held the jury instructions violated the accused's fourteenth

amendment right to due process. Mullaney, 421 U.S. at 703.

The Mullaney decision provides that petitioner in the instant case is shielded by the fourteenth amendment from any obligation to prove an element of the crime of murder. Because the jury instructions explicitly stated that absence of heat of passion is an element of murder, the holdings of Mullaney, 421 U.S. at 684 and In Re Winship, 397 U.S. at 358, shield petitioner from an obligation to prove any of the four elements of heat of passion.

Undoubtedly, the State of New Jersey is permitted to place the burden of proving heat of passion on the accused by making such an affirmative defense separate and apart from the elements of any charged offense. See Patterson v. New York, 432 U.S. 197 (1977). In Patterson, this Court found constitutional the New York legislative scheme for murder and manslaughter, which placed on a criminal

defendant the burden of proving by a preponderance of the evidence that he or she "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." Patterson, 432 U.S. at 198 *quoting* New York Penal Law Section 125.25(1)(a). The distinction between Patterson and Mullaney is that in Patterson, New York made the facts underlying the reduction from murder to manslaughter an affirmative defense and kept such facts separate from the elements of murder. In Mullaney, as in the present case, there is no such separation. Therefore, the jury instructions in the instant case switched the burden to petitioner on actual elements of the crime of murder, in violation of the fourteenth amendment.

When this Court views the challenged jury instructions in the context of the whole charge, as it must, see Cupp v. Naughten, 414 U.S. 141 (1973), this Court will

find that the confusion and implicit burden shifting is not rectified by other aspects of the charge.

POINT TWO

THE TRIAL COURT'S INSTRUCTION THAT "WORDS ALONE DO NOT CONSTITUTE ADEQUATE PROVOCATION" IN A CASE WHERE WORDS PROVIDE THE PROVOCATION JUSTIFYING A MANSLAUGHTER CONVICTION UNCONSTITUTIONALLY REMOVED THE CENTRAL FACTUAL ISSUE FROM THE CONSIDERATION OF THE JURY

Viewed in the light most favorable to the prosecution, the evidence indicates that petitioner killed Ms. Hansen, in part, because he found what he believed to be a "love card" from another man. The card, addressing Ms. Hansen as "dearest one," was signed "I love you, Yours forever" and contained the phrase "missed your kisses." After petitioner confronted Ms. Hansen with the card both over the telephone and later in person, the two argued bitterly. It is clear, based

on the evidence, that petitioner's factual theory of this case justifying a verdict of passion-provocation manslaughter was that words, both spoken and written, plunged him into a state of despair in which he committed the lethal acts.

As stated, absence of heat of passion is an element of murder in New Jersey. As also stated, heat of passion has four factors which are to be passed upon by the jury. One of the four factors is whether the jury finds the provocation to be adequate. In the context of this case, the issue becomes whether the jury finds adequate provocation in petitioner's finding the "love card," in the conversations over the phone between petitioner and Ms. Hansen, and in the heated verbal argument between the two in Ms. Hansen's apartment immediately preceding her death. As with all central questions of fact in a criminal case, the jury will reach this decision by viewing the totality of the circumstances, in a

certain context, and the personality traits of the individuals involved in these events. However, the trial judge effectively removed this crucial issue from the jury when he charged "words alone do not constitute adequate provocation."

Only last year, in United States v. Gaudin, __U.S. __, 115 S.Ct. 2310 (1995), Justice Scalia, writing for the Court, observed, "the Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without 'due process of law'" and that the Sixth Amendment provides "'(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury.' We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

Gaudin, __U.S. at__ , 115 S.Ct. at 2313; See Sullivan v. Louisiana, __U.S. at __, 113 S.Ct. at 2080, 2081.

By instructing the jury that "words alone do not constitute adequate provocation" in a case such as this, where the evidence clearly shows the petitioner was provoked by words - written, spoken and screamed - the court violated petitioner's sixth amendment right to have the jury consider this issue without undue judicial interference. By this charge, the trial court plunged headlong into the role of the jury and effectively decided the ultimate and central issue in this murder case, namely whether petitioner was guilty of murder or passion-provocation manslaughter. After hearing the challenged instruction, the only way the jury could acquit petitioner of murder would be to literally ignore the instruction. This is especially true here because the prosecution need only disprove one of the four heat of

passion factors. The court's instruction, by itself, accomplished that.

Even though the trial judge's usurpation of the jury's role in Gaudin, __U.S. at __, 115 S.Ct at 2310, is perhaps more blatant than that in the instant case, the holding in Gaudin, applies with equal force to the facts here. In Gaudin this Court held that the trial judge committed constitutional error by deciding the issue of materiality, an element of a charged offense, rather than referring this issue to the jury. While the ultimate issue in the instant case was certainly referred to the jury, it was referred in such a manner that unless the jury literally ignored the instruction, the only possible verdict would be to convict petitioner of murder. If this Court's decision in Gaudin is to have the vitality afforded it by the sixth amendment, it should be read to encompass the facts of this case.

Analogous cases can also be found in the context of mandatory presumptions which serve to unconstitutionally relieve the prosecution's burden under In Re Winship, 397 U.S. at 358. See Cage v. Louisiana, 498 U.S. at 39; Carella v. California, 491 U.S. at 263; Francis v. Franklin, 471 U.S. 307 (1984); Sandstrom v. Montana, 442 U.S. at 511. The challenged instruction in the instant case served, in essence, as a mandatory presumption that if the jury believed words provoked petitioner, they must reject the partial defense of heat of passion and, instead, find him guilty of murder.

In reliance on the cases cited herein, and on the fifth, sixth and fourteenth amendments to the United States Constitution, petitioner urges this court find the jury instruction unconstitutional.

CONCLUSION

For the reasons set forth herein, petitioner respectfully urges this court to grant his Petition for a Writ of Certiorari.

Dated: January 17, 1996

Respectfully,

Almir P. DeSouza
No. 251556
New Jersey State Prison
Second and Cass Streets
CN 861
Trenton, New Jersey 08625
Pro Se

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5452-92T4

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

ALMIR P. DESOUZA,

Defendant-Appellant

Submitted February 28, 1995 - Decided July 6, 1995

Before Judges Stern, Keefe and Humphreys

On appeal from the Superior Court of New Jersey
Law Division, Monmouth County

PER CURIAM

Defendant was convicted of murder, N.J.S.A. 2C:11-3 (count one), possession of a knife for an unlawful purpose, N.J.S.A. 2C:39-4d (count two), and possession of a knife under inappropriate circumstances, N.J.S.A. 2C:39-

5d (count three). The trial judge merged the possession for an unlawful purpose conviction with the murder conviction, and sentenced defendant to sixty years with thirty years before parole eligibility on count one. He imposed a concurrent nine-month sentence on the conviction for possession under circumstances not manifestly appropriate.

On this appeal, defendant raises no issue addressed to the introduction, weight or sufficiency of the evidence. He argues, through counsel:

POINT I THE JURY INSTRUCTIONS ON PASSION/PROVOCATION MANSLAUGHTER SHIFTED THE BURDEN OF PROOF TO DEFENDANT, IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL. U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. (1947) ART. I, PARS. 1,9,10. (Not Raised Below).

POINT II THE PROSECUTOR'S SUMMATION COMMENTS IMPROPERLY ACCUSING DEFENSE COUNSEL OF FABRICATING DEFENSES AND INVOKING SYMPATHY FOR THE DECEASED

VICTIM, DEPRIVED DEFENDANT OF THE RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL. U.S. CONST. AMENDS V, VI, XIV; N.J. CONST. (1947) ART. I, PARS 1,9,10 (Not Raised Below).

POINT III DEFENDANT'S SENTENCE WAS MANIFESTLY EXCESSIVE

POINT IV BOTH OF DEFENDANT'S CONVICTIONS FOR WEAPONS OFFENSES SHOULD HAVE BEEN MERGED WITH THE CONVICTION FOR MURDER.

In a pro se supplementary brief, defendant also contends:

POINT I THE TRIAL COURT ERRED BY NOT VOIR DIRE (sic) ONE OF THE JUROR ABOUT POSSIBLE PREJUDICIAL REACTION FROM READING THE NEWSPAPER AND THEREBY DENIED DEFENDANT HIS RIGHT TO FAIR TRIAL.

POINT II PROSECUTOR'S STATEMENT DURING THE TAKING OF DEFENDANT'S STATEMENT AND SUMMATION VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL. U.S. CONST. (1947) ART I, PARS. 9, 10.

In its brief, "(t)he State concedes that the conviction under N.J.S.A. 2C:39-5d merges with defendant's murder conviction." Accordingly, we vacate the sentence imposed

on count three. We find that the other contentions lask merit and do not require discussion is a written opinion, except as noted herein. R. 2:11-3(E)(2).

A jury question was presented as to whether defendant was reasonably provoked by the victim's conduct and whether he had an adequate opportunity to "cool off." There is no question that the judge properly charged that the State had the burden of disproving passion/provocation in order to convict for murder.

There are four elements of passion/provocation: (1) the provocation must be adequate, (2) defendant must not have had time to cool off between the provocation and the killing, (3) the provocation must have actually impassioned the defendant and (4) defendant must not, in fact, have actually cooled off before the killing. See State v. Erazo, 126 N.J. 112, 123 (1991); State v. Mauricio, 117 N.J. 403,

411 (1990). The first two elements are objective and the latter two elements are subjective. Defendant seems to be claiming that there was error in terms of the charge on the four elements in the sense that the judge instructed the jury that the State only had to disprove one of them. However, all four elements must exist to have passion/provocation, and the State merely has to disprove beyond a reasonable doubt any one of them. See Mauricio, supra, 117 N.J. at 411. "If a slaying does not have all those elements, the offense of passion/provocation manslaughter cannot be demonstrated." Ibid.

The judge charged:

> In order for you to find the defendant guilty of murder, the State need only disprove one of these four factors beyond a reasonable doubt... If you determine that the State has disproved beyond a reasonable doubt that there was adequate provocation or that the provocation actually impassioned the defendant or that the defendant did not have a reasonable time to cool off of that the

defendant did not actually cool off and in addition to disproving one of those four factors you determine that the State has proven beyond a reasonable doubt that the defendant purposely or knowingly caused the death or serious bodily injury resulting in death, you must find the defendant guilty of murder.

Hence, the injury charge was not inconsistent with the cited cases.

In instructing on whether or not there was an actual loss of self control, the judge stated that "you must determine whether the time between the particular provoking incident and the act which caused the death was inadequate for the return of a reasonable person's self-control" (emphasis added). In other words, the judge did not charge that the State had to prove it was "adequate." With respect to whether defendant actually cooled off, the judge instructed the jurors, "you must determine whether the defendant actually did not cool off before committing

the act which caused the death." (Emphasis added). Putting in the negative what the State had to disprove may have caused some confusion regarding the issue of burden of proof. Defendant, however, acknowledges that the language was essentially taken from the model charge, and we find that the charge, as a whole, properly conveyed the elements and the State's obligation to disprove at least one element of passion/provocation manslaughter in order to prove murder. See State v. Heslop, 135 N.J. 318, 326 (1994); State v. Coyle, 119 N.J. 194, 221-22 (1990); State v. Grunow, 102 N.J. 133, 145 (1986). See also State v. Reyes, __ N.J. __, __ (1995)(slip op. At 20)(must consider clarity of charge as whole.

In any event, defendant voiced no objection to the instructions when given. If he perceived error or confusion, the problem could have been remedied by supplementary

instructions before the jury reached a verdict. His objection comes too late, and we find no plain error. See R. 2:10-2 .

The conviction on count three is vacated. The judgment on count one is affirmed.

SUPREME COURT OF NEW JERSEY
C-250 SEPTEMBER TERM 1995
40,826

STATE OF NEW JERSEY,

Plaintiff-Respondent

v.

ON PETITION FOR CERTIFICATION

ALMIR P. DESOUZA

FILED OCT 24, 1995

Defendant-Petitioner

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5452-92 having been submitted to this Court, and the Court having considered the same;

It is ordered that the petition for certification is denied.

Witness, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 23rd day of October, 1995.

Clerk of the Supreme Court